IN THE HIGH COURT OF JUDICATURE AT PATNA

Cr.Misc. No.13315 of 2007

ABDUL HAQUE @ HAZI ABDUL HAQUE ANSARI, S/o Late Khududian Mian, R/o village Mirzapur, P.O. & P.S. Mehasi, District East Champaran at Motihari

…. Petitioner

Versus

1. STATE OF BIHAR
2. Md. Kyamuddin Ansari, S/o Late Rauf Ansari, R/o village Mirzapur, P.O. & P.S. Mehasi, District East Champaran at Motihari

… Opposite Parties

For the petitioner : M/s S.Alamdar Hussain & Subodh Kumar, Advocates
For the State : Mr. Jharkhandi Upadhaya, A.P.P.
For O.P. No. 2 : Mr. Sangeet Deokuliar, Advocate

O R D E R

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The petitioner who is one of the F.I.R. named accused of Mehasi P.S. Case No. 51 of 2005 has filed this application for quashing of the order dated 18.1.2007 passed by the learned Sessions Judge, East Champaran at Motihari, in Cr. Revision No. 475 of 2006, whereby the Revisional Court has been pleased to set aside the order dated 21.11.2006 passed in the aforesaid P.S. case by the learned Chief Judicial Magistrate, whereby he had taken cognizance and directed for issuance of summons.

It appears that the aforesaid case was registered under section 302/34 I.P.C. and 27 of the Arms Act on the basis of the fardbeyan given by one Md. Kyamuddin Ansari impleading 8 persons including petitioner in the aforesaid offences on the allegation that in the evening of 20.7.2005 while the informant

along with his family members were sitting in his home, his father Abdul Rauf Ansari had gone to answer the call of nature towards litchi orchard where the F.I.R. named accused had apprehended the informant's father and the petitioner gave order to fire at him. It is further alleged that on *hulla* being raised the informant rushed towards the orchard and in the light of the torch saw that co-accused Atiqure Rahman and Shahid Raza had caught hold of the hands of his father and Rizwan @ Nanhe, Ubaidur Rahman, Shahidur Rahman, Mashuddin Ansari were assaulting his father. It is also alleged that seeing the informant, co-accused Maksud Ansari fired at the chest of the informant's father and announcing that they had finished their work all the accused persons fled away. The informant thereafter with the help of co-villagers brought his father to Mahesi Hospital where doctor declared him dead. The genesis of the occurrence is said to be previous enmity between the parties.

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It appears that after due investigation the police submitted a charge sheet on 29.10.2005 against 6 of the F.I.R. named accused except Atiqure Rahman and Hazi Abdul Haque Ansari. Cognizance having been taken against the six charge sheeted accused the case was transferred to the Court of Sri D.K.Singh, Judicial Magistrate, 1st Class and was subsequently

committed to the Court of Sessions.

It further appears that on completion of further investigation the police submitted a supplementary diary and final form on 30.210.2006 showing that the accusation against the petitioner herein and co-accused Atiqure Rahman was false and in fact on the date of occurrence i.e. 20.7.2005 Atiqure Rahman was present at Shivaji Nagar P.S., Mumbai and the petitioner was in capable of participating in the alleged offence. However, the final form submitted by the police did not find favour with the learned Chief Judicial Magistrate who by order dated 21.11.2006 found a prima facie case under section 302/34 I.P.C and 27 of the Arms Act to have been made out against Atiqure Rahman and the petitioner herein and directing for issuance of process against them transferred the case to the Court of Sri D.K.Singh, Judicial Magistrate.

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Aggrieved by the order taking cognizance the petitioner preferred Criminal Revision No. 475 of 2006 before the Sessions Judge, East Champaran at Motihari who rejected the said revision vide order dated 18.1.2007.

The grievance of the petitioner is that the learned Chief Judicial Magistrate as also the Revisional Court without going into the merit of the case and without application of judicial mind erroneously had taken cognizance and the Revisional

Court had erroneously dismissed the revision.

It was submitted on behalf of the petitioner that summoning of an accused in a criminal case is a serious matter and a criminal case could not be set into motion as a matter of course. On this premise it was submitted that the learned Sessions Judge ought to have considered the entire material available on the record before deciding whether the issuance of process against the petitioner by the learned Chief Judicial Magistrate was bona fide and based on materials available on the record. It was also submitted that the learned Chief Judicial Magistrate ought to have considered the effect and relevance of the final form at the time of taking cognizance more so when the said final form was based on examination of witnesses and copy of certain documents and he should have assigned reasons for not accepting the same and disagreeing with it. It was also submitted that the Revisional Court also did not peruse the materials available on the record which had prompted the police to submit a final form and instead of remanding the case to the Chief Judicial Magistrate to consider the materials available on record and pass fresh orders in accordance with law it had instead placed reliance on the statement of the interested witnesses who had supported the accusation against the petitioner which prompted him to hold

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that no interference was called for.

Another pertinent point which was raised by the learned counsel for the petitioner was whether the lower court after taking cognizance in the matter and committing the case to the Court of Sessions had power to issue summons or warrant against the petitioner in a case which was pending before the Sessions Judge. From perusal of the order dated 21.11.2006 passed by the learned Chief Judicial Magistrate while taking cognizance it appears that the cognizance was taken against the petitioner and another only because cognizance was taken against other accused on 31.10.2005 and the record has been transferred to the Court of Sri D.K.Singh, and on perusal of the order of the Revisional Court, it appears that the Revisional Court did not dwell upon this aspect of the matter.

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So far as the second point in respect of the power of the magisterial court to take cognizance when part of the case has been committed to the Court of Sessions is concerned the learned counsel sought to place reliance on a judgment of a Single Judge of this Court dated 2.2.2007 passed in Cr. Misc. No. 40599 of 2006 (Sri Niwas Prasad & ors. Vs. The State of Bihar) which in turn had placed reliance on a Division Bench judgment of this Court in the case of Yamuna Pathak Vs. The State of Bihar reported in 1994(2) PLJR 96 wherein in

paragraph 9 it was observed, thus, "from the simple perusal of the above provision of law it is crystal clear that a supplementary charge sheet can legally be submitted provided "further investigation" in respect of an offence after the first charge sheet is submitted is held and upon such further investigation "further evidence" is obtained. Thus a supplementary charge sheet can be submitted in respect of additional evidence collected in course of further investigation held which could not be available in course of the investigation held earlier."

It is not clear from both the impugned orders whether any further investigation was held after the submissions of the charge sheet against the six accused and whether fresh materials showing the complicity of the petitioner and the other had found place in the supplementary case diary. It is also not clear as to what materials were available in the supplementary case diary so as to lead the learned Chief Judicial Magistrate to differ from the final form submitted by the police and to take cognizance. If the reliance placed by him is on the evidence of the interested witnesses who have supported the prosecution case then the same was available in the original case diary.

Due regard being had to the short comings in the

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orders of the two Courts below as pointed out above it would only be fit and proper to remit the case back to the learned Chief Judicial Magistrate, East Champaran at Motihari to give a fresh finding on consideration of the final report and supplementary case diary.

Accordingly the application is allowed and the two impugned orders of Courts below are hereby quashed.

(Abhijit Sinha, J.)

Patna High Court, Patna.
Dated : The 24th of October, 2008
Sanjay Pd./A.F.R.

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